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No. 1046

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

NICK GURVICH,

Plaintiff in Error,

vs.

UNITED STATES,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

Plaintiff in error, defendant in the court below, was indicted and tried for the crime of selling liquor to minors, contrary to the provisions of the statute in such case made and provided. According to the testimony (Record, 21-37), defendant, as we shall hereafter call him, was the holder of barroom license No. 93-D, issued on the 12th day of August, 1903, and running for the period of one year, from July 1, 1903. (Record, 20, 24.) Under said license he was the proprietor of a saloon on Douglas Island, Alaska, known as the Slavonian saloon. Defendant himself never tended bar (Record, 24, 32, 33); he employed two bar-keepers, who tended

the bar. He was city marshal of Treadwell City, an adjoining town, and resided there. He visited his saloon daily, counted the cash, ordered goods and exercised full control and direction over the business, usually spending about an hour daily at the saloon. In the months of July, August, September, October, November and December, 1903, sales of intoxicating liquors were made by the bar-keepers to the minors, Bernie Noonan, Frank Insley, and other minors. This occurred on six or seven different occasions. The bar-keepers knew that said persons were minors at the time of the sales. Plaintiff in error instructed his bar-keepers not to sell liquor to minors. (Record, 22, 27, 29, 31.) He never even heard of boys buying liquor or getting drunk at his saloon (Record, 35), until one Mr. McDonald, the marshal of Douglas, came to him and stated that he had been informed by the commissioner that boys had been getting liquor there. (Record, 22, 28.) And Bernie Noonan got beer "every month" for his father (Record, 28, 37), Mr. Thomas Noonan, the foreman of the Treadwell mine, who paid for it. So it appears that defendant did not himself sell any liquor to the minors; but he was nevertheless convicted and sentenced. (Record, 6, 7, 46.)

The jury that convicted him was composed of six (only five names are mentioned in the minutes of trial) instead of twelve men. (Record, 5.)

These are all the facts which we deem necessary to justify, and even compel, a reversal of the judgment herein.

SPECIFICATION OF ERRORS.

We follow the assignment of errors. (Record, 9.)

1. The Court erred in compelling the defendant to go to trial, over his objections, before a jury composed of only six instead of twelve jurors.

2. The Court erred in overruling the defendant's motion in arrest of judgment.

3. The Court erred in refusing the prayer of the defendant to instruct the jury as follows:

"Gentlemen of Jury: Under the law a man is not responsible criminally for the act of his employee, unless the act of the employee is done with the knowledge and consent of the employer, or by the employer's directions, either expressed or implied. In the case you are now trying, there is no proof that the defendant himself sold any liquor to minors, but such sales, if any, were made by the defendant's employees. Now, unless you find and believe from the evidence beyond a reasonable doubt that the sales, if any, made by the employees, were so made by the direction of the defendant, either expressed or implied, or with his knowledge and consent, then you will find the defendant not guilty."

4. The Court erred in instructing the jury as follows:

"This being accepted as the burden placed upon the prosecution, it is necessary to determine the nature of the knowledge that is required under the statute affecting the sale or permission to sell to the person described. 'Permit' is defined by Webster in the following language: 'to let through; to allow or suffer to be done; to tolerate or put up with.' One may permit by giving

express authority to another to do a particular act or he may allow or suffer the act to be done or tolerated, and may knowingly do so when under obligation of law to prevent the act and takes no adequate action or means to prevent being done that which the law requires him to prevent. In other words, if a man, when required by law to refrain from doing a particular act, furnishes the means to others with which to do that act, which is forbidden by law, and having furnished the means and placed it in the power of another to do the act and adopts no adequate means to prevent its being done, he may be said to knowingly permit the act."

5. The Court erred in instructing the jury as follows:

"It may be necessary for the Court to determine in this case and to instruct the jury in this behalf, whether the knowledge of the bar-keepers who were placed in this saloon for the conduct of the business and the sale of intoxicants was the knowledge of the defendant. The Court charges you that when the bar-keepers of the defendant were selling liquor to minors and others, they were selling it under the license that had been granted to the defendant; all sales made in the Slavonian saloon after the license was granted were sales, either lawful or otherwise, under said license, and if made in violation of its terms such act or sale or giving away intoxicants was unlawful and the act of the bar-keeper, the agent, was the act of the principal, and, in my opinion, under the peculiar language of the statutes of Alaska, the knowledge of the agents or bar-keepers was the knowledge of the principal."

And for the said errors, defendant prays that said cause be reversed and a new trial granted.

ARGUMENT.

1. The Court erred in compelling the defendant to go to trial, over his objections, before a jury composed of only six instead of twelve jurors. His demand for a constitutional jury of twelve men was denied, to which ruling of the Court defendant then and there excepted. (Record, 20). The Alaska Code, Title II, § 171, among other things, provides as follows: "The jury shall consist of twelve persons unless the parties consent to a less number. Such consent shall be entered in the journal; provided, that hereafter in trials for misdemeanors six persons shall constitute a legal jury." We contend that the quoted portion of the said section is void because it deprives a person of the right of trial by a jury of twelve competent, impartial men as guaranteed to every citizen by the provisions of the constitution. (Con., art. III, § 2, cl. 3; and Amendments, art. 7.) We contend, further, that Congress has no power under the constitution to pass an act authorizing a trial in a criminal case by a jury of less than twelve men. The terms "jury" and "trial by jury" are, and always have been, well known in the language of the law. As used in the constitution they mean twelve competent men, disinterested and impartial, not of kin, nor personal dependents of either of the parties, etc. (Black's Law Dictionary.) And a "trial by jury" is a trial by such a body so constituted. Of the numerous citations of authorities for our contention, with which we might

weary the Court, we content ourselves with only one, which we think abundant,—Thompson vs. State of Utah, 170 U. S. 343.

Such a provision cannot be sustained on the theory that it is a police regulation; for as such it would be equally obnoxious to law and justice. The only theory upon which such legislation with regard to inferior and limited tribunals has been sustained, is that upon an appeal from such tribunals, the defendant would be entitled to a trial by a constitutional jury. But such reasoning is not applicable to the District Court of Alaska. That the citizens of Alaska, then, are guaranteed the constitutional right of a trial by jury cannot be questioned. The Alaska Code, Title III, § 367, provides that "so much of the common law as is applicable and not inconsistent with the constitution of the United States or with any (lawful) law passed or to be passed by the Congress is adopted and declared to be the law within the district of Alaska." And article 3 of the Treaty of Cession between the United States and Russia provides that "the inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion."

2. The second error assigned is the overruling defendant's motion in arrest of judgment. (Record, 48.) Although we think the Court erred in overruling said motion, it was, perhaps, a matter of discretion, and

considering the Court's views, we cannot claim that its ruling amounted to an abuse of discretion.

3. The third error assigned is the refusing the prayer of the defendant to instruct the jury as follows:

"Gentlemen of the Jury: Under the law a man is not responsible criminally for the act of his employee, unless the act of the employee is done with the knowledge and consent of the employer, or by the employer's directions, either expressed or implied. In the case you are now trying, there is no proof that the defendant himself sold any liquor to minors, but such sales, if any, were made by the defendant's employees. Now, unless you find and believe from the evidence beyond a reasonable doubt that the sales, if any, made by the employees, were so made by the direction of the defendant, either expressed or implied, or with his knowledge and consent, then you will find the defendant not guilty." (Record, 38.) We still maintain that this instruction asked for is good law and that the Court ought to have given it just as it was without garbling it. The Court itself in the instructions which it did give admits the facts which made this requested instruction pertinent and proper. "In the case you are now trying there is no proof that the defendant himself in person sold any liquor to minors, but such sales, if any, were made by the defendant's employees." (Record, 41.) Does not our law abhor and everybody's sense of justice revolt at the bare idea of punishing a man for a crime that he did not commit?

And in regard to the charge of selling liquor to the boy Noonan for his father, who ordered and paid for it, the Court says: "This, in my opinion, was not giving of liquor or selling liquor to the boy. * * * " (Record, 42.)

4. It is not necessary to repeat the instruction given, the giving of which forms the fourth assignment for error. It will be found in our fourth specification of errors—in the assignment of errors (Record, 10), and in the instructions of the Court (Record, 40). The only argument which we think necessary to make upon this head consists of the objections made by our associates when the instruction was given: 1. Said instruction placed upon the defendant an active duty to guard against the violation of the law by his employees which is not required by law. 2. It made the defendant criminally liable unless he absolutely prevented his employees from selling to minors, which is not the law. (Record, 40.)

5. It is not necessary to repeat the instruction given, the giving of which forms the fifth assignment for error. It will be found in our fifth specification of errors, in the assignment of errors (Record, 10), and in the instructions of the Court (Record, 43). We contend that under the indictment in this case, it is not the law that the knowledge of the agents or bar-keepers is the

knowledge of the principal, and we do not think this point needs more than statement.

We respectfully submit that the judgment herein should be reversed and a new trial granted.

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